Citation: *AK v Canada Employment Insurance Commission*, 2022 SST 1151

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (459558) dated April 5, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Teleconference
Hearing date:	September 27, 2022
Hearing participant:	Appellant
Decision date:	October 6, 2022
File number:	GE-22-1616

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he failed to comply with the employer's mandatory COVID-19 vaccination policy (Policy).

[4] The Claimant doesn't dispute that this happened. He says that from his understanding, that was the cause of his dismissal. He did not express any other reason why the employer might have let him go.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Issue

[6] Did the Claimant lose his job because of misconduct?

Analysis

[7] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

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[1] Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Why did the Claimant lose his job?

[8] I find that the Claimant lost his job because he did not comply with the employer's Policy requiring vaccination against COVID-19. That is the reason for the dismissal given by the employer. That is the Claimant's understanding of the reason for his dismissal, though he did testify that he thought he was in compliance. I will deal with that last point when discussing the misconduct factors below. He provided no evidence for some other reason for the dismissal. In fact, the Claimant's evidence of his long-term employment with the employer, his positive relations with managers and co-workers, and his work ethic, do not suggest any other reason for dismissal than the non-compliance with the Policy.

Is the reason for the Claimant's dismissal misconduct under the law?

[9] The reason for the Claimant's dismissal is misconduct under the EI law.

[10] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it is almost wilful.[3] The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[4]

[11] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[5]

[12] The Commission has to prove that the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.[6]

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[2] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[3] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[4] See *Attorney General of Canada v Secours*, A-352-94.
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[13] The Commission says that there was misconduct because the factors in the definition of misconduct, above, have been proven. The requirements of the Policy were clearly communicated to the Claimant, and repeated. He made a deliberate decision not to take the vaccine. That breached the Policy. He knew he faced suspension or dismissal for non-compliance. His non-compliance caused the dismissal.

[14] The Claimant says that there was no misconduct because he has never shown any signs of misconduct during his employment. He honestly and truthfully did not believe that he would be terminated from his job. Directive 6 never mentioned termination, particularly for him working from home (3-45). Not getting the vaccination did not impair his ability to do his job.

[15] The Claimant raised a number of other arguments in support of his position. The Tribunal does not have the authority to take those other arguments into consideration in deciding this appeal, as explained under the third subheading below.

[16] I find that the Commission has proven that there was misconduct, because it has proven the factors that define misconduct for EI purposes.

– **Findings of fact relating to the issue of misconduct**

[17] The Claimant worked for the employer hospital for 10 years, prior to his dismissal on November 18, 2021. He was not a member of a union. He worked as an integration specialist dealing with the network servers for the employer’s computer systems. Initially, he worked on-site in the administration building, but had no contact with patients, and some contact with his small team of co-workers. His work was done from the office, over the computer. It did not involve installing or servicing individual computers or work stations in the hospital itself. His work could be done 100% remotely, including from his home. When COVID-19 first arose, he started working from home at the employer’s direction. The employer planned to demolish the administration building in which he had worked. In August 2021, the employer told him that he would work from home for the foreseeable future until a new building was constructed. The employer told the Commission that the Claimant might have to come to another hospital office during the demolition and construction, or even to the hospital in case of disaster.

There was no guarantee that the Claimant would not have to come to the hospital in person.

[18] On August 17, 2021, the Chief Medical Officer of Health issued Directive 6. The Directive applied to hospitals and other health care providers. It was based on the increased risk of transmission and severity of the Delta variant of COVID, and the impact on vulnerable patients and the health care system's capacity. The Directive required hospitals to have a COVID vaccination policy. The policy must require employees to provide proof of full vaccination, or written proof of a medical reason for not being fully vaccinated, or proof of completing an education session prior to declining vaccination for any reason other than medical. Hospitals could omit or remove the education session option, and require that employees comply with one of the other two options.

[19] The copy of the Policy in evidence is undated. It references Directive 6. According to the employer, the Policy came into effect on September 7, 2021. Effective on that date, the Policy requires that all employees provide proof of one of three options. They are: proof of vaccination status; proof of exemption from vaccination based on medical grounds; or proof of completing an educational session approved by the employer, attending a mandatory consultation prior to declining vaccination for any reason other than medical exemption, followed by regular antigen testing. Exemptions had to be approved by the employer. The Policy then stated that effective October 12, 2021, all employees will be required to have their second dose of the vaccine and provide proof to the employer, unless the employer has approved medical exemption from vaccination, "or as per applicable legislation". As of that date, the education session and consultation followed by regular testing had been dropped as an option in the Policy. The Claimant was aware that this option was no longer available after October 12th. After that date, the only two options were either vaccination, or exemption. The Policy outlined the consequences of non-compliance with its requirements. An employee without an approved exemption who had not provided proof that he has received the second dose of the vaccine as of October 12, 2021, will be placed on an unpaid leave of absence. An employee placed on such leave who will

have until November 9, 2021, to submit proof of full vaccination. Failure to comply with the Policy "may result in discipline up to and including termination of employment." The Policy states that it applies to "all [name of hospital] employees, staff, contractors, students, volunteers and any businesses or entities operating on the hospital site." The Claimant testified that he was included in that group. In response to the question whether the Policy required proof of vaccination from employees working from home 100% of the time, the employer's Director, Employee Relations, told the Commission that the Policy applied to all employees.

[20] The employer said that the Policy was communicated to employees verbally and in writing prior to the September 7th effective date. The employer provided a one-page "Mandatory Vaccination Timeline" information sheet, as of September 1, 2021. The Claimant said that he was aware of the Policy. He received a copy in early September 2021, and read the entire document. He complied with the requirement for the educational session, mandatory consultation with the occupational health nurse, and with twice weekly antigen testing. He also read a copy of Directive 6. He thought the Directive's rationale of preventing the spread of COVID did not apply to him, as he was working from home and had no contact with co-workers or patients. He did not request an exemption from the vaccine requirement on any ground, because he thought he would not be fired. He did not receive the vaccine, or provide any proof of vaccination to the employer up to the date of his dismissal.

[21] The employer placed the Claimant on unpaid leave starting on October 13, 2021. In its letter to the Claimant dated October 20, 2021 (headed "**Disciplinary Letter #1**") the employer stated he was non-compliant with the Policy by not providing proof of two doses of the vaccine by October 12th, or proof of one dose plus an attestation by October 12th that he would receive his second dose by November 9, 2021. The letter stated that it was considered to be progressive discipline. It stated that failure to comply with the Policy "may result in further discipline up to and *including* termination of employment". It stated that he had until November 9, 2021, to submit proof of vaccination. The employer sent the Claimant a second letter, dated October 26, 2021, headed **"Disciplinary Letter #2"**. The letter stated it was further progressive discipline,

repeated the warning of discipline up to and including termination, and offered the extended option of getting the first dose of the vaccine by November 9th, with proof of an appointment for a second dose. The employer sent the Claimant a third letter, dated November 3, 2021, headed **"Disciplinary Letter #3"**. The letter repeated the items from the previous letter, and set a mandatory Zoom meeting for November 19th.

[22] After placing the Claimant on a leave of absence without pay on October 13, 2021, the employer dismissed the Claimant effective November 18, 2021.

[23] The Commission initially decided on February 1, 2022, that the Claimant had lost his job on November 11, 2021, as a result of voluntarily leaving without just cause, or misconduct. It said "given that your benefit period begins on October 10, 2021, benefits are refused from this date only." It is unclear whether the Commission means October 10th, or November 11th.[7] The Commission's Representations, which refer to both suspension and dismissal, do not clarify that issue. Nor does the reconsideration decision letter dated April 5, 2022, assist. It refers to a decision dated January 21, 2022, which it maintains. The Commission spoke with the Claimant on January 21st, but no decision was stated in that conversation, and the actual decision letter is dated February 1st. In a telephone conversation with the Claimant on April 5, 2022, it is clear that he is disputing the dismissal decision. His request for reconsideration focused on his being dismissed, rather than quitting.

[24] As a result of this confusion, and the limitation on the Tribunal's jurisdiction to dealing with the reconsideration decision, I will deal in this appeal only with the dismissal of the Claimant effective November 18, 2021. His suspension prior to that date, while useful as background information, is not the focus of my decision. I have to focus on the dismissal effective November 18, 2021, and not rule on the validity of the suspension prior to that date.

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[7] The employer stated the termination date as November 18, 2021, in the comment section of the ROE (GD3-22). The employer and the Claimant said November 19, 2021, in later conversations with the Commission (GD3-24 and 41). I accept the ROE date of November 18th as more reliable, it being a business record, and having been made on November 25, 2021, closer to the time of the dismissal.

– **Ruling on misconduct**

[25] The Commission has proven the four factors that make up misconduct for EI purposes.

[26] First, the non-compliance with the mandatory vaccination requirement was wilful. The Claimant's decision not to take the vaccine was conscious, deliberate and intentional. He made the choice based on his concerns about the vaccine, the validity of the Policy, and his religious faith. He did not claim an exemption, as he thought he would not be fired for not getting the vaccine. With respect to these concerns, the Claimant was presented with a dilemma: from one side, pressure to take the vaccine to keep his job; from the other side, pressure to abide by the tenets of his faith, and his other concerns which remained unanswered. The Claimant resolved the dilemma by choosing one side over the other. Despite opposing pressures, he made the intentional, deliberate and conscious choice to refuse the vaccine. That meets the definition of wilfulness.

[27] The Claimant said that the Commission had not proven wilfulness. He testified that while he was hesitant about the vaccine, he was not ignoring the Policy. He did decide not to be vaccinated. But he did not disobey the Policy. Therefore, his decision was not wilful. That argument does not succeed. First, he did disobey the Policy, which was clear: vaccinate or get an exemption. He did neither. Therefore he did disobey the Policy. Second, the argument is based on a false separation of the decision not to be vaccinated from the consequences of that decision. The action that is the alleged misconduct (in this appeal, not being vaccinated or exempted) cannot be separated from the effects that action has on the employment. Both must be considered in assessing wilfulness.[8] The Commission has proven the factor of wilfulness.

[28] Second, the Claimant was aware, or should have been aware, that there was a real possibility of being suspended or let go because of his non-compliance with the vaccination requirement. The Claimant received, read and understood the Policy and Directive 6. He understood that the option of antigen testing was no longer an option for

[8] *Canada (Attorney General v Tucker),* A-381-85.

him after October 12th. After that date, the only options were vaccination or exemption. As he did not seek an exemption, the only option left was vaccination. The Policy was clear. If an employee had not received the second dose of the vaccine as of October 12th, he will be placed on an unpaid leave of absence to reconsider his vaccination status. Failure to comply with the Policy may result in discipline up to and including termination of employment. The Claimant was aware by October 13, 2021, that he would be suspended because he was in fact suspended on that date, and his employment computer access had been blocked. At one point (GD3-41), the Claimant said that he was on Directive 6. This ties in with his testimony that he was complying, and since Directive 6 did not mandate suspension or termination, he was not aware of the possibility of dismissal. This argument does not succeed. Directive 6 is directed to hospitals, not to employees. It requires that hospitals have a vaccination policy, and provided three options. The lack of authorization to hospitals to include discipline, including suspension and termination, does not prevent hospitals from including such discipline in their own policy. Employers must have a mechanism for enforcing the mandate. The Claimant had to comply with the Policy, not with Directive 6.

[29] In relation to termination of employment, the evidence of the possibility of dismissal is less clear-cut. The Policy said that non-compliant employees "will be placed on an unpaid leave of absence" as of October 12, 2021. All mentions of termination of employment, in the Policy and in the three disciplinary letters sent to the Claimant, said "may result in discipline up to and including termination of employment." Initially, staff and some managers thought that termination of employment was an idle threat, a scare tactic. The Claimant testified that he did not think that he would be fired. He testified that there had been no firm statement from the employer that people <u>will</u> be fired. On October 13th, the employer placed the Claimant on an unpaid leave of absence. At that point, the Claimant should have known that termination of employment for failing to take the vaccine was a real possibility, not a scare tactic. He found himself on an unpaid leave of absence. He was told in the three subsequent disciplinary letters the steps needed to preserve his job, and the deadline of November 9th for taking the first step. The Claimant testified that his reaction to the three disciplinary letters was that it was merely a scare tactic. In each of those letters, he was told the consequence

of failing to take that first step by November 9th: possible termination of employment. His thinking that he would not be fired was not reasonable in the circumstances. He did talk to the employer about the possibility of dismissal. The answer was that discipline measures would be decided on a case-by-case basis, up to termination of employment. His manager told him that he did not think the Claimant would be fired. The Claimant assumed that he would be on layoff, then return to work at a later date. The Claimant assumed that he would not be fired, because he had no in-person contact with other employees. He testified that he was complying with the Policy, and with Directive 6, because he was not in contact with others. Since the rationale of the Policy was to prevent the spread of COVID, and he had no in-person contact with co-workers, he was outside the Policy's rationale. With respect to Directive 6, he thought he was outside the rationale of the Directive too. When asked at the hearing if Directive 6 said that unvaccinated persons were not allowed to work, he did not recall of it did. Directive 6 did not expressly say that non-compliant employees should be suspended or dismissed, or otherwise disciplined. Nor did it expressly say that non-compliant employees cannot attend the hospital for work. But the rationale for Directive 6 supports an inference that removal of unvaccinated or unexempted employees from hospitals was necessary to support that rationale. The Claimant's thinking he would not be fired was based on too many false assumptions on his part. Those assumptions did not negate the possibility of termination of employment expressed in the Policy and in the three letters. He should have known by the November 3rd letter, at the latest, that dismissal was a real possibility. Since this factor in the definition of misconduct requires that the claimant knew or should have known of the possibility of dismissal, the Commission has proven this factor.

[30] Third, the Claimant knew or should have known that his non-compliance could get in the way of carrying out his duties toward his employer. It would be obvious to the Claimant once he was suspended and his access to the employer's computer system was blocked, that he could not carry out any of his duties toward the employer. Not being vaccinated as required by the Policy was a breach of a duty owed to the employer. The Claimant testified that his ability to carry out his employment duties was not impaired, so there was no interference with carrying out his duties to the employer.

He testified that his was his strong point. He worked remotely, therefore there was no impairment to his duties. While the Claimant's personal abilities remained unimpaired, and he had been working remotely, once suspended or dismissed, he could no longer perform any of his job duties. The performance of services under the employment contract is an essential condition of employment.[9] His non-compliance prevented him from working. That is what got in the way of carrying out his duties toward his employer. Had he complied, he would have continued working. In addition, it is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.[10] The Commission has proven this factor of misconduct.

[31] Fourth, the Claimant's non-compliance with the vaccine requirement was the cause of his being suspended, then dismissed. As discussed above, that was the Claimant's understanding of why he was suspended, then dismissed. There was no evidence to suggest that there was any other cause for the suspension and dismissal. The Commission has proven this factor as well.

[32] The Claimant referred to the benefit of the doubt principle.[11] The principle applies in cases involving misconduct. It says that if the evidence about a circumstance that would lead to disqualification from receiving EI benefits is evenly balanced on each side, the claimant gets the benefit of the doubt. That principle does not apply in this appeal, as the preceding paragraphs show that the evidence is not evenly balanced. The evidence supports a finding of misconduct on all the circumstances involved in the factors defining misconduct.

– **Response to the Claimant's other arguments not addressed in the Ruling**

[33] In assessing these arguments, the starting point of the analysis is the limited authority of the Tribunal in deciding EI appeals. Unlike the superior courts, the Tribunal does not have wide-ranging jurisdiction or authority to deal with most factual or legal

[9] *Canada (Attorney General) v. Lavallée*, 2003 FCA 255.
[10] *Canada (Attorney General) v Bellevance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[11] *Employment Insurance Act*, section 49(2).

issues that may be presented to it. The General Division EI Section of the Tribunal only has jurisdiction to deal with a specific reconsideration decision made by the Commission.[12] In relation to an appeal from that specific decision, the Tribunal may dismiss the appeal, confirm, rescind or vary the decision of the Commission in whole or in part or give the decision that the Commission should have given.[13] That limits what the Tribunal can do in EI matters to reviewing decisions the Commission makes under the *Employment Insurance Act* and its regulations. The Tribunal General Division EI section has to work within that framework.

[34] The Claimant says that the employer has breached the employment contract, unilaterally and substantially changed the terms of employment, and wrongfully dismissed him. It was the employer who engaged in misconduct. The Tribunal does not have the authority to rule on those issues in a misconduct appeal.[14] The Claimant's remedies lie with the courts, not with the Tribunal.

[35] The Claimant says that the employer had to prove with extensive expert evidence that the Policy was rationally supported by science. The requirement for full vaccination is not ethical or reasonable, therefore not enforceable. The Tribunal does not have the jurisdiction to assess an employer's policy for scientific validity, or for ethical validity or for reasonableness. I cannot rule that an employer should have done something different in its policies. Nor does the jurisdiction extend to giving a ruling that would alter an employer's policy. The Claimant here asks that I totally negate the Policy by declaring it to be unenforceable. I have no authority to do that.

[36] The Claimant referred to two arbitrators' decisions involving influenza vaccination policies. These decisions were made in the grievance process under a collective agreement between a union and an employer. The arbitrators ruled on whether the policies violated the terms of the collective agreement. The arbitrators had no authority to rule on misconduct for EI purposes. These two decisions do not assist the Claimant.

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[12] *Employment Insurance Act,* sections 112 and 113.
[13] *Department of Employment and Social Development Act*, section 54(1).
[14] *Canada (Attorney General) v. Caul*, 2006 FCA 251; *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

[37] The Claimant says that the employer has broken numerous laws. In his Notice of Appeal, the Claimant refers to the Commission's *Digest of Benefit Entitlement Principles* (Digest) for several arguments, and to more general laws. I will deal briefly with the arguments based on the Digest in this paragraph. The Digest is not a law, but the Commission's interpretation of the *Employment Insurance Act* and Regulations. The Claimant first refers to Chapter 6, which deals with voluntarily leaving employment. He refers to 6.5.10, which deals with significant changes in work duties. That chapter does not apply in this appeal. The chapter deals with employees who have voluntarily quit their jobs, and whether they had just cause to quit because of significant changes in work duties. In this appeal, the Claimant did not quit, he was suspended then dismissed for misconduct. The Claimant next refers to Chapter 7, which deals with misconduct. He relies on 7.2.4, "elements to consider in a finding of misconduct". I have dealt with the arguments advanced by the Claimant under this Chapter in the ruling on misconduct above.

[38] With respect to other laws the employer has allegedly broken, the Claimant refers to the *Universal Declaration on Bioethics and Human Rights* (Declaration), says that human rights and fundamental freedoms are to be fully respected, and that the interests and welfare of the individual should have priority over the sole interest of science or society. He also says that he has the right to bodily integrity and privacy, and that he has the right to consent to medical treatment. The Declaration is an international treaty. Any remedy the Claimant seeks under the Declaration must be sought in the courts or international bodies. As to fully respecting human rights and fundamental freedoms, Canada has human rights laws throughout the country, as well as the *Canadian Charter of Rights and Freedoms* (Charter). For human rights, the remedy lies with the various human rights bodies at the federal, provincial and territorial levels. With respect to the Charter, the Claimant did not raise it as a ground in this appeal. The Tribunal has a limited jurisdiction to rule on the Charter's application to the *Employment Insurance Act* and Regulations. That jurisdiction requires an appellant to apply to the Tribunal to include a Charter challenge in his appeal. If they show that they have identified a specific law they say violates the Charter, and that they have outlined a constitutional argument to justify hearing a challenge to that law, then the Tribunal can

hear the appeal, including the Charter challenge. Since there is no Charter challenge in this appeal, I cannot rule on the impact of the Charter on the misconduct sections of the *Employment Insurance Act*. The next argument is that the interests and welfare of the individual should have priority over the sole interest of science or society. That is not a correct statement of the law. While individual rights and freedoms are given a high value in our law, they are not absolute. The Charter recognizes this in section 1.[15] The use of seat belts and helmets is mandatory on public roads. Mandatory restrictions during COVID-19, such as lockdowns and vaccinations, have been imposed. A recent court decision upheld the mandatory vaccination requirement.[16] The Claimant also says that he has the right to bodily integrity and privacy, and that he has the right to consent to medical treatment. That is correct. But it is not an absolute right, as discussed above. Issues of privacy lie within the jurisdiction of the courts, or privacy bodies, not within the jurisdiction of the Tribunal. The right to consent to medical treatment deals with the relation between the treating health professional and the patient. The patient has the right to refuse treatment. The Claimant exercised that right by refusing to be vaccinated.

So, did the Claimant lose his job because of misconduct?

[39] Based on my findings above, I find that the Claimant lost his job because of misconduct.

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[15] "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[16] *Syndicat des métallos, section local 2008 c. Procureur générale du Canada*, 2022 QCCS 2455 (French only at time of publishing). This is a recent Québec court decision involving a situation parallel to the one in this case: a government directive that employers have a COVID-19 mandatory vaccination policy, the employer having such a policy, and unvaccinated employees facing dismissal as a result. The union challenged the policy under the Charter. The court ruled that while the mandatory vaccination requirement did violate the right to security of the person, the requirement was valid under s. 1 of the Charter as a reasonable limit in a free and democratic society.

Conclusion

[40] The Commission has proven that the Claimant lost his job because of misconduct effective November 18, 2021. Because of this, the Claimant is disqualified from receiving EI benefits.

[41] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section